

Aug 15, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DALE W.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:17-CV-3062-LRS

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT,
*INTER ALIA***

BEFORE THE COURT are the Plaintiff's Motion For Summary Judgment (ECF No. 13) and the Defendant's Motion For Summary Judgment (ECF No. 20).

JURISDICTION

Dale W., Plaintiff, applied for Title II Disability Insurance benefits (DIB) and Title XVI Supplemental Security Income benefits (SSI) on November 4, 2013. The applications were denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on July 13, 2015 before Administrative Law Judge (ALJ) Tom L. Morris. Plaintiff testified at the hearing, as did Vocational Expert (VE) Trevor Duncan. On September 25, 2015, the ALJ issued a decision finding the Plaintiff disabled beginning May 1, 2015. The Appeals Council denied a request for review of the ALJ's decision, making that decision the Commissioner's final decision

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1 subject to judicial review. The Commissioner's final decision is appealable to district
2 court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).

4 **STATEMENT OF FACTS**

5 The facts have been presented in the administrative transcript, the ALJ's
6 decision, the Plaintiff's and Defendant's briefs, and will only be summarized here. At
7 the time of the administrative hearing, Plaintiff was 62 years old. He has past
8 relevant work experience as a product demonstrator, wire puller, lubrication services
9 manager, retail manager, retail sales clerk, yard laborer and truck driver. Plaintiff
10 alleges disability since June 8, 2013, on which date he was 60 years old.

12 **STANDARD OF REVIEW**

13 "The [Commissioner's] determination that a claimant is not disabled will be
14 upheld if the findings of fact are supported by substantial evidence...." *Delgado v.*
15 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere
16 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less
17 than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
18 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir.
19 1988). "It means such relevant evidence as a reasonable mind might accept as
20 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91
21 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may
22 reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457
23 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
24 On review, the court considers the record as a whole, not just the evidence supporting
25 the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.

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1 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

2 It is the role of the trier of fact, not this court to resolve conflicts in evidence.
3 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
4 interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749
5 F.2d 577, 579 (9th Cir. 1984).

6 A decision supported by substantial evidence will still be set aside if the proper
7 legal standards were not applied in weighing the evidence and making the decision.
8 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.
9 1987).

10 11 ISSUES

12 Plaintiff argues the ALJ erred in: 1) evaluating the medical opinions of record
13 prior to May 1, 2015; 2) discounting Plaintiff's credibility prior to May 1, 2015; 3)
14 finding that Plaintiff's depression was not a "severe" impairment prior to May 1,
15 2015; and 4) failing to consult a medical expert to determine the onset disability date.

16 17 18 DISCUSSION

19 SEQUENTIAL EVALUATION PROCESS

20 The Social Security Act defines "disability" as the "inability to engage in any
21 substantial gainful activity by reason of any medically determinable physical or
22 mental impairment which can be expected to result in death or which has lasted or can
23 be expected to last for a continuous period of not less than twelve months." 42
24 U.S.C. § 1382c(a)(3)(A). The Act also provides that a claimant shall be determined
25 to be under a disability only if her impairments are of such severity that the claimant

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1 is not only unable to do her previous work but cannot, considering her age, education
2 and work experiences, engage in any other substantial gainful work which exists in
3 the national economy. *Id.*

4 The Commissioner has established a five-step sequential evaluation process for
5 determining whether a person is disabled. 20 C.F.R. §§ 404.1520 and 416.920;
6 *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines
7 if she is engaged in substantial gainful activities. If she is, benefits are denied. 20
8 C.F.R. §§ 404.1520(a)(4)(i) and 416.920(a)(4)(i). If she is not, the decision-maker
9 proceeds to step two, which determines whether the claimant has a medically severe
10 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii) and
11 416.920(a)(4)(ii). If the claimant does not have a severe impairment or combination
12 of impairments, the disability claim is denied. If the impairment is severe, the
13 evaluation proceeds to the third step, which compares the claimant's impairment with
14 a number of listed impairments acknowledged by the Commissioner to be so severe
15 as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii) and
16 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or
17 equals one of the listed impairments, the claimant is conclusively presumed to be
18 disabled. If the impairment is not one conclusively presumed to be disabling, the
19 evaluation proceeds to the fourth step which determines whether the impairment
20 prevents the claimant from performing work she has performed in the past. If the
21 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §§
22 404.1520(a)(4)(iv) and 416.920(a)(4)(iv). If the claimant cannot perform this work,
23 the fifth and final step in the process determines whether she is able to perform other
24 work in the national economy in view of her age, education and work experience. 20
25 C.F.R. §§ 404.1520(a)(4)(v) and 416.920(a)(4)(v).

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1 The initial burden of proof rests upon the claimant to establish a prima facie
2 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
3 Cir. 1971). The initial burden is met once a claimant establishes that a physical or
4 mental impairment prevents her from engaging in her previous occupation. The
5 burden then shifts to the Commissioner to show (1) that the claimant can perform
6 other substantial gainful activity and (2) that a "significant number of jobs exist in the
7 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,
8 1498 (9th Cir. 1984).

9 10 **ALJ'S FINDINGS**

11 The ALJ found the following: 1) Plaintiff has "severe" medical impairments,
12 those being lumbar degenerative disc disease and essential hypertension; 2) Plaintiff's
13 impairments do not meet or equal any of the impairments listed in 20 C.F.R. § 404
14 Subpart P, App. 1; 3) Prior to May 1, 2015, Plaintiff had the residual functional
15 capacity (RFC) to perform light work as defined in 20 C.F.R. §§ 404.1567(a) and
16 416.967(a), with the ability to frequently crouch, kneel and crawl; occasionally climb
17 ramps, stairs, ladders, ropes and scaffolds, and balance and stoop; and needing to
18 avoid concentrated exposure to fumes, odors, dusts, gases, and poor exposure, as well
19 as concentrated exposure to extreme cold, wetness, humidity, vibration and hazards;
20 4) Beginning on May 1, 2015, Plaintiff's RFC further required him to periodically
21 alternate sitting with standing for 2-3 minutes; 5) Prior to May 1, 2015, Plaintiff was
22 capable of performing his past relevant work as a product demonstrator, lubrication
23 services manager, retail manager and retail sales clerk; 6) Beginning May 1, 2015, the
24 Plaintiff's RFC precluded him from performing any of his past relevant work; and
25 7) Considering Plaintiff's age, education and work experience, Medical-Vocational

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1 Rule 202.06 directed a finding of “disabled” even if Plaintiff had the RFC to perform
2 the full range of light work. Accordingly, the ALJ concluded the Plaintiff was not
3 disabled prior to May 1, 2015, but that he was disabled beginning May 1, 2015.
4

5 **MEDICAL OPINIONS/SYMPTOM TESTIMONY**

6 It is settled law in the Ninth Circuit that in a disability proceeding, the opinion
7 of a licensed treating or examining physician or psychologist is given special weight
8 because of his/her familiarity with the claimant and his/her condition. If the treating
9 or examining physician's or psychologist's opinion is not contradicted, it can be
10 rejected only for clear and convincing reasons. *Reddick v. Chater*, 157 F.3d 715, 725
11 (9th Cir. 1998); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If contradicted, the
12 ALJ may reject the opinion if specific, legitimate reasons that are supported by
13 substantial evidence are given. *Id.* “[W]hen evaluating conflicting medical opinions,
14 an ALJ need not accept the opinion of a doctor if that opinion is brief, conclusory,
15 and inadequately supported by clinical findings.” *Bayliss v. Barnhart*, 427 F.3d 1211,
16 1216 (9th Cir. 2005). The opinion of a non-examining medical advisor/expert need
17 not be discounted and may serve as substantial evidence when it is supported by other
18 evidence in the record and consistent with the other evidence. *Andrews v. Shalala*,
19 53 F.3d 1035, 1041 (9th Cir. 1995).

20 In his decision, the ALJ noted as follows:

21 While the claimant experiences some back problems,
22 imaging of the claimant's lumbar spine shows no
23 significant progression of the disease. For in June 2012,
24 a lumbar MRI show mild canal stenosis at L1-2 (sic), mild
25 to moderate central canal stenosis at L4-5, and moderate
26 stenosis at L5-S1 (1F19). A lumbar MRI in
27 October 2013 was unchanged (1F6). The
28 claimant's lumbar MRI from May 2014 showed no
change in degenerative disc disease. [7F2].

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1 (AR at p. 17).

2 While the ALJ correctly summarized the results of the June 2012 MRI, there
3 was no October 2013 MRI and what the ALJ cited to at “1F6” was also the June 2012
4 MRI which is found at both “1F6” (AR at p. 312), “1F19” (AR at p. 325), and “1F28”
5 (AR at p. 334).

6 Plaintiff saw Jeremiah Crank, M.D., at Yakima Neighborhood Health Services,
7 on October 9, 2013. Dr. Crank completed a Washington Department of Social Health
8 Services (DSHS) “Physical Functional Evaluation” form in October 2013, in which
9 he opined that Plaintiff’s back condition was of “marked” severity in that it
10 significantly interfered with his abilities to sit, stand, walk, lift, carry, handle, push,
11 pull, reach, stoop and crouch. (AR at p. 308). He also opined that Plaintiff was
12 limited to “sedentary” work in that he could not lift more than 10 pounds and could
13 walk or stand for only brief periods. (AR at p. 309). Dr. Crank elaborated upon this
14 in a narrative report from the same date (October 9, 2013). (AR at pp. 313-16).

15 J. Dalton, M.D., reviewed the medical evidence for DSHS on October 29, 2013,
16 and based on Dr. Crank’s report dated October 9, 2013, concluded Plaintiff’s “pain
17 and limited back motion” was supported by medical evidence, and that the severity
18 and functional limitations assigned by Dr. Crank were consistent with the medical
19 evidence. (AR at p. 444).

20 Plaintiff was eventually referred by Dr. Crank to Matthew Fewel, M.D., a
21 neurosurgeon at Kadlec Medical Center, in August 2014. Plaintiff advised he had not
22 gotten any relief from physical therapy. (AR at p. 454). Dr. Fewel then referred the
23 Plaintiff to Lisa Miller, ARNP, who saw Plaintiff in September 2014. She wrote:

24 In summary, this is a 61 year old gentleman who has low
25 back pain with bilateral L5-S1 radicular symptoms. His
lumbar MRI in 2012 showed degenerative disk and facet

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hypertrophy combined causing moderate foraminal narrowing and central stenosis at L4-5 and L5-S1. He did update his MRI on 5-27-14[,] however I do not have the images to review. The report indicated no significant changes. At this time we will request his new MRI images. His symptoms are most likely due to the foraminal stenosis and central stenosis noted above. He has tried multiple conservative measures. He is afraid of needles and is wary of an injection. He would be a candidate for a lumbar epidural steroid injection. Probably plan on a caudal with catheter lumbar epidural steroid injection targeting right and left L5 and S1 nerve roots under fluoroscopic guidance. Patient will call our office if he wishes to proceed.

(AR at p. 461).

In November 2014, Dr. Fewel finally received the 2014 MRI images. He stated there was “[v]ery little if any change from 2012, DDD at L5-1 with facet arthropathy and moderate lateral recess stenosis L4-5.” (AR at p. 632). In May 2015, the Plaintiff reported worsening axial back pain in the last six months and now a willingness on his part to have an epidural steroid injection. (AR at p. 644). A physician’s assistant, Megan Bellman, PA-C, reviewed the May 2014 lumbar MRI with Dr. Fewel and reported: “Congenital narrowing throughout due to short pedicles. Moderate LR-5 and 5-S1 stenosis with bilateral foraminal narrowing at these levels. Disc degeneration and facet arthropathy seen. No significant change from 2012.” (AR at p. 646).

The ALJ gave “significant weight” to the opinions of two non-examining physicians, Robert Hander, M.D., and Robert Hoskins, M.D., dated January 9, 2014 and March 7, 2014 respectively. These two physicians reviewed the record and opined that Plaintiff essentially had the exertional capacity for light work. (AR at pp. 85-91; 96-103). The ALJ gave “little weight” the Dr. Crank’s opinion because of the opinions of Drs. Hander and Hoskins, and because the Plaintiff’s condition had remained stable since 2012; he had maintained normal strength in the lower

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1 extremities; and his gait, as well as tandem walking, were intact. (AR at p. 18). For
2 essentially the same reasons, the ALJ found the Plaintiff's statements "concerning the
3 intensity, persistence and limiting effects of these symptoms are not entirely credible
4 prior to May 1, 2015." (AR at p. 17). Beginning May 1, 2015, however, the ALJ
5 found the Plaintiff's allegations regarding his symptoms and limitations were
6 "generally credible:"

7 Previously, the [Plaintiff] had tried only conservative treatment
8 but the [Plaintiff] began considering more serious measures
9 such as an epidural steroid injection in the lumbar spine.
10 [Citation omitted]. As such, the [Plaintiff's] pain complaints
11 are more credible and support his testimony that he has to
12 change positions when sitting.

13 (AR at p. 18).

14 At the hearing, Plaintiff testified he could sit for about 20 minutes before he
15 experiences pain in his right pelvis and his leg goes numb. (AR at p. 39). He stated
16 that makes it necessary for him to get up and walk around for a few minutes. (*Id.*).
17 Plaintiff testified it is necessary for him to lie down two times day for between 35 and
18 45 minutes in order to relieve pain. (AR at p. 40).

19 Where, as here, the Plaintiff has produced objective medical evidence of an
20 underlying impairment that could reasonably give rise to some degree of the
21 symptoms alleged, and there is no affirmative evidence of malingering, the ALJ's
22 reasons for rejecting the Plaintiff's testimony must be clear and convincing. *Garrison*
23 *v. Colvin*, 759 F.3d 95, 1014 (9th Cir. 2014); *Burrell v. Colvin*, 775 F.3d 1133, 1137
24 (9th Cir. 2014). If an ALJ finds a claimant's subjective assessment unreliable, "the
25 ALJ must make a credibility determination with findings sufficiently specific to
26 permit [a reviewing] court to conclude that the ALJ did not arbitrarily discredit [the]
27 claimant's testimony." *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.2002).

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1 Among other things, the ALJ may consider: 1) the claimant's reputation for
2 truthfulness; 2) inconsistencies in the claimant's testimony or between her testimony
3 and her conduct; 3) the claimant's daily living activities; 4) the claimant's work
4 record; and 5) testimony from physicians or third parties concerning the nature,
5 severity, and effect of claimant's condition. *Id.* Subjective testimony cannot be
6 rejected solely because it is not corroborated by objective medical findings, but
7 medical evidence is a relevant factor in determining the severity of a claimant's
8 impairments. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

9 It is not a "clear and convincing" reason to discount Plaintiff's symptom
10 testimony prior to May 1, 2015, because it was only after that date he considered
11 "more serious measures such as an epidural steroid injection in the spine." Indeed,
12 the fact Plaintiff eventually was willing to consider more serious measures indicates
13 his symptoms were worsening prior to May 1, 2015. As noted above, in May 2015,
14 the Plaintiff reported worsening axial back pain in the last six months. Contrary to
15 the Commissioner's position, the medical evidence does not show a clear
16 "demarcation of worsening" and certainly not May 1, 2015 as a demarcation date.

17 Engaging in physical therapy, a conservative form of treatment, reveals little
18 about the level of Plaintiff's pain at that time and the extent of his functional
19 limitations. During the month of December 2013, Plaintiff had several therapy
20 sessions at Central Washington Physical Therapy. (AR at pp. 508-525). While
21 Plaintiff reported some improvement of his symptoms while he was in therapy
22 (decrease from 62% functional deficit at initial visit on December 5 to 54% deficit at
23 December 17 visit), by the time of his final visit on December 31, he was back to a
24 62% functional deficit. (AR at p. 508).

25 According to the ALJ in his written decision:

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1 The [Plaintiff] said he could only walk 125 feet before
2 kneeling over to relieve pain but yet he also testified that
3 he recently walking (sic) 4 blocks and did not mention
4 anything about having to take breaks. This appears
5 inconsistent with his testimony of extreme difficulties
6 walking.

7 (AR at p. 17). Use of the word “appears” suggests uncertainty and Plaintiff’s hearing
8 testimony confirms the same. Plaintiff was asked whether he was getting any
9 exercise and testified that he tried to last Saturday. He walked two blocks to a nearby
10 school, decided he was not going to walk around the school perimeter, and then
11 walked home. Plaintiff was not asked about whether he needed to take any breaks.
12 (AR at pp. 61-63). This is not a “clear and convincing” reason to discount Plaintiff’s
13 testimony about his physical limitations.

14 What remains then is the ALJ’s citations to the record indicating that while
15 Plaintiff “had some reduced lumbar range of motion,” he “maintained full range of
16 motion of the extremities,” he “did not have motor weakness or sensation deficit in
17 the lower extremities,” his “balance and gait were intact,” his “[h]eel, toe, and tandem
18 walking are normal,” and “[w]hile at times straight leg has been positive, reports also
19 indicate it is negative.” (AR at p. 17). As noted above, subjective testimony cannot
20 be rejected solely because it is not corroborated by objective medical findings.
21 *Rollins*, 261 F.3d at 857. The ALJ’s finding that Plaintiff was disabled starting May
22 1, 2015, was not based on particular objective findings indicating a worsening of the
23 severity of Plaintiff’s back condition, but only on the fact that Plaintiff had decided
24 to go ahead with epidural steroid injections. As discussed above, that decision is not
25 a “clear and convincing” reason to discount Plaintiff’s symptom testimony for the
26 period before May 1, 2015.¹ None of the examining medical professionals at Kadlec

27 ¹ The ALJ did not cite Plaintiff’s daily living activities as a reason for

1 Medical Center suggested Plaintiff's limitations were not as great as opined by Dr.
2 Crank, nor did they suggest the Plaintiff's symptoms could not have worsened despite
3 the lack of significant change between the 2012 MRI and the 2014 MRI.

4 The ALJ did not provide "clear and convincing" reasons for discounting
5 Plaintiff's symptom testimony and in turn, did not provide specific and legitimate
6 reasons for giving less weight to the opinion of Dr. Crank as compared to the
7 opinions of the two non-examining physicians, Drs. Hander and Hoskins.

8 9 **REMAND**

10 Social security cases are subject to the ordinary remand rule which is that when
11 "the record before the agency does not support the agency action, . . . the agency has
12 not considered all the relevant factors, or . . . the reviewing court simply cannot
13 evaluate the challenged agency action on the basis of the record before it, the proper
14 course, except in rare circumstances, is to remand to the agency for additional
15 investigation or explanation." *Treichler v. Commissioner of Social Security*
16 *Administration*, 775 F.3d 1090, 1099 (9th Cir. 2014), quoting *Fla. Power & Light Co.*
17 *v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598 (1985).

18 In "rare circumstances," the court may reverse and remand for an immediate
19 award of benefits instead of for additional proceedings. *Id.*, citing 42 U.S.C. §405(g).

20 _____
21 discounting his symptom testimony and therefore, the court cannot consider the
22 Commissioner's arguments in that regard in the response brief. (ECF No. 20 at
23 pp. 7-8). The ALJ may not be affirmed on a ground on which he did not rely.
24
25 *Garrison*, 759 F.3d at 1010.

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1 Three elements must be satisfied in order to justify such a remand. The first element
2 is whether the “ALJ has failed to provide legally sufficient reasons for rejecting
3 evidence, whether claimant testimony or medical opinion.” *Id.* at 1100, quoting
4 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). If the ALJ has so erred, the
5 second element is whether there are “outstanding issues that must be resolved before
6 a determination of disability can be made,” and whether further administrative
7 proceedings would be useful. *Id.* at 1101, quoting *Moisa v. Barnhart*, 367 F.3d 882,
8 887 (9th Cir. 2004). “Where there is conflicting evidence, and not all essential factual
9 issues have been resolved, a remand for an award of benefits is inappropriate.” *Id.*
10 Finally, if it is concluded that no outstanding issues remain and further proceedings
11 would not be useful, the court may find the relevant testimony credible as a matter of
12 law and then determine whether the record, taken as a whole, leaves “not the slightest
13 uncertainty as to the outcome of [the] proceedings.” *Id.*, quoting *NLRB v. Wyman-*
14 *Gordon Co.*, 394 U.S. 759, 766 n. 6 (1969). Where all three elements are satisfied-
15 ALJ has failed to provide legally sufficient reasons for rejecting evidence, there are
16 no outstanding issues that must be resolved, and there is no question the claimant is
17 disabled- the court has discretion to depart from the ordinary remand rule and remand
18 for an immediate award of benefits. *Id.* But even when those “rare circumstances”
19 exist, “[t]he decision whether to remand a case for additional evidence or simply to
20 award benefits is in [the court’s] discretion.” *Id.* at 1102, quoting *Swenson v.*
21 *Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989).

22 Here, the three elements are satisfied. The ALJ failed to provide legally
23 sufficient reasons for rejecting evidence, whether claimant testimony or medical
24 opinion; no outstanding issues remain to be resolved before a determination of
25 disability onset can be made; further administrative proceedings would not be useful;

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1 and the record, taken as a whole, leaves not the slightest uncertainty as to the outcome
2 of the proceedings.

3 Dr. Crank's opinion was rendered in early October 2013, a mere four months
4 after Plaintiff's 60th birthday on June 8, 2013. There is nothing in the record
5 suggesting Dr. Crank would have opined anything different had his opinion been
6 rendered in June 2013. A remand to determine an onset date is simply not warranted.
7 Accordingly, in accord with Medical-Vocational Rule 201.06 (Plaintiff limited to
8 sedentary work as opined by Dr. Crank, instead of light work), Plaintiff was disabled
9 as of June 8, 2013.²

11 CONCLUSION

12 Plaintiff's Motion For Summary Judgment (ECF No. 13) is **GRANTED** and
13 Defendant's Motion For Summary Judgment (ECF No. 20) is **DENIED**. The
14 Commissioner's decision is **REVERSED**. Pursuant to sentence four of 42 U.S.C.
15 §405(g) and § 1383(c)(3), this matter is **REMANDED** to the Commissioner for an
16 award of disability benefits based on an onset date of June 8, 2013, instead of May
17 1, 2015. An application for attorney fees may be filed by separate motion.

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24 ² It is unnecessary to consider whether the ALJ erred in not finding Plaintiff
25 to have a "severe" mental impairment.

IT IS SO ORDERED. The District Executive shall enter judgment accordingly, forward copies of the judgment and this order to counsel of record, and **close the case.**

DATED this 15th day of August, 2018.

s/Lonny R. Suko
 LONNY R. SUKO
 Senior United States District Judge